Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions	)))	GN Docket No. 12-268

PETITION FOR RECONSIDERATION

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Pursuant to Section 1.429 of the Federal Communications Commission's ("Commission's" or "FCC's") Rules, T-Mobile USA, Inc. ("T-Mobile"),[1] respectfully submits this Petition for Reconsideration of the Commission's *Report and Order* in the above-captioned proceeding ("*Incentive Auction Report and Order*").[2]

I. INTRODUCTION

Adopting two minimum sales prices is unnecessary and contrary to the Commission's goal of encouraging competition, maximizing the efficient use of the spectrum resource, and recovering a portion of license value for taxpayers.[3] In its *Incentive Auction Report and Order*, the Commission adopted a minimum sales price with two components: (1) an aggregate amount sufficient to cover all mandatory expenses set forth in the Spectrum Act (i.e., compensation for participating broadcasters, relocation costs, and relevant administrative costs of the auction),[4] as well as any remaining amounts needed in connection with FirstNet;[5] and (2) a price per MHz-POP-based reserve price requiring that the proceeds meet either (a) an average price per MHz-

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[1] T-Mobile USA, Inc. is a wholly owned subsidiary of T-Mobile US, Inc., a publicly traded company.
[2] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567 (2014) ("*Incentive Auction Report & Order*").
[3] *See id.* ¶ 343.
[4] *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(c)(2), 126 Stat. 156 (2012) ("Spectrum Act").
[5] *Incentive Auction Report and Order* ¶ 26 (2014).

POP; *or* (b) an aggregate amount of revenues based on a spectrum clearing benchmark set prior to the auction and remaining the same throughout the auction (i.e., the total price must exceed the product of (x) a price benchmark times (y) a spectrum clearing benchmark times (z) the total U.S. pops).[6]

The Commission's decision to adopt a minimum price per MHz-POP is problematic. Adopting a minimum per MHz-POP price for licenses in addition to an aggregate reserve increases the risk of foreclosure, heightens the risk of auction failure, and introduces unneeded complexity in an already complex auction process.

II. THE COMMISSION'S MHZ-POP RESERVE PRICE DESERVES RECONSIDERATION

The Commission must reconsider its adoption of a per MHz-POP reserve price because it failed to "articulate a satisfactory explanation for" its decision, "including a 'rational connection between the facts found and the choice made.'"[7] Thus, the Commission's decision contains a material omission that warrants reconsideration.[8] In particular, the Commission failed to account for the substantial risks that a MHz-POP reserve price would introduce into the incentive auction, a one-time opportunity to provide carriers access to 600 MHz spectrum.

First, setting a premium reserve pricing mechanism risks thwarting competition by introducing new opportunities for AT&T and Verizon to foreclose competitors from the market. T-Mobile has no concerns about satisfying the expenses Congress required the Commission to

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[6] *Id.* ¶ 340. This spectrum clearing benchmark formulation "will allow the auction to close if the incentive auction repurposes a relatively large amount of spectrum for wireless uses, even if the price per-MHz-POP is less than the benchmark price." *Id.* ¶ 26. Note that because the spectrum clearing benchmark and the price per MHz-POP benchmark are fixed before the auction, this formulation functionally serves as an aggregate reserve price.

[7] *See Motor Vehicle Manufacturers Assn. of the United States, Inc. v. State Farm Mutual Automobile Insur. Co.*, 463 U.S. 29, 43 (1983).

[8] *See, e.g.*, 47 C.F.R. §1.429; *see also In the Matter of Connect Am. Fund*, Third Order on Reconsideration, 27 F.C.C. Rcd. 5622 ¶ 1 (2012) (explaining that reconsideration is warranted when a Commission decision contains a material omission or error) ("*In the Matter of Connect Am. Fund*").

satisfy in the Spectrum Act, including paying broadcasters for their spectrum, covering up to $1.75 billion of the broadcasters' relocation expenses,[9] and fully funding any remaining FirstNet expenses.[10] However, the MHz-POP reserve price represents a super-premium payment over and above the minimum payment level Congress established in the Spectrum Act that contradicts the Commission's findings about the lack of market competition and the need for expanded access to low-band spectrum resources.[11]

The Commission has recognized that the two dominant carriers have the incentive and ability to deny competitive carriers access to the low-band spectrum available in the incentive auction.[12] In creating reserve blocks in the 600 MHz incentive auction, the Commission sought to prevent Verizon and AT&T from denying their competitors access to the low-band resources necessary to compete by raising prices beyond the equilibrium established in a fully competitive market.[13] Rather than advancing the objective of preventing foreclosure, the *Incentive Auction Report and Order* undoes it by adding a premium payment requirement on top of the requirement to cover all congressionally-mandated expenses before any spectrum may be sold, including spectrum from the reserve. In effect, the premium pricing prong of the *Order*'s reserve price does the work of foreclosure on the dominant carriers' behalf. Instead of raising prices above the level of a competitive market themselves, Verizon and AT&T will rely on a government-mandated, super-premium reserve price to deny competitors access to the low-band

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[9] Spectrum Act § 6403(c)(2).
[10] *Incentive Auction Report and Order* ¶ 26.
[11] All statutory expenses are provided for in the first prong of the minimum payment requirement. If bidders were only expected to pay only what Congress directed the Commission to collect, the second prong of the minimum payment requirement would be redundant.
[12] *Policies Regarding Mobile Spectrum Holdings: Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6133 (2014) ¶ 62 ("We agree with the Antitrust Division of the DOJ, one of our nation's expert antitrust agencies: there is a risk of foreclosure in downstream wireless markets.") ("*MSH Report and Order*").
[13] *See id.* ¶ 41 (discussing the risks of foreclosure strategies in todays' wireless marketplace).

resources necessary for competition. Establishing a minimum sales price that not only exceeds the financial obligations established by Congress, but also determines whether reserve blocks are available re-introduces the very type of foreclosure risk that the Commission has otherwise sought to constrain.[14]

Second, in supplanting a government agency's judgment about the intrinsic value of spectrum for that of the market, the Commission risks creating artificial scarcity in the spectrum resources needed to satisfy consumers' burgeoning demand for mobile broadband. Predicting the market value of spectrum is challenging in the best of circumstances. Changing financial conditions, fluctuating consumer demand, and business-specific service constraints all make predicting final auction prices difficult.[15] The complex design of the incentive auction makes this task even more complex. In a typical auction, the Commission knows the quantity of spectrum being sold, its precise geographic location, and the presence and extent of any impairments or limitations on operations associated with the license. In the incentive auction, however, none of these factors is known or even knowable. The quantity of the spectrum and its location are not known until broadcaster supply is tested in the simultaneous reverse auction. Furthermore, the presence and extent of impairments on licenses (and the concomitant effect on the value of any such licenses) cannot be known until the Commission has identified a feasible band reconfiguration and then optimized that band reconfiguration to ensure a low-cost,

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[14] *See, e.g., Incentive Auction Report and Order* ¶ 10 (adopting a market-based spectrum reserve "designed to ensure against excessive concentration in holdings of low-band spectrum"); *MSH Report and Order* ¶ 175 (adopting a mobile spectrum holdings policy in light of "the importance of multiple providers, including rural and regional providers, having access to below-1-GHz spectrum for deployment and competition).

[15] *See, e.g.,* Philip Cusick et al., *Telecom Services & Towers*, J.P. Morgan at 1 (Dec. 5, 2012) ("spectrum valuation is more art than science, with valuations swinging widely due to supply and demand"); Paul de Sa, *Weekend Media Blast: Spectrum, Metaphors and Megahertz*, Bernstein Research (July 18, 2014) (explaining that attempts to identify a price per MHz-POP of spectrum are "like attempts to predict the value of commercial real estate in midtown Manhattan in 2016 based on the price of a condo in Miami in 2010 – unlikely to be very accurate, except by chance").

spectrum-maximizing repacking of any remaining incumbents. These elements of uncertainty make any prediction about the likely per unit sales price of spectrum extraordinarily challenging.

Unlike a typical spectrum auction, moreover, the Commission will have no opportunity to re-run the incentive auction if its judgment about market prices proves inaccurate.[16] When the Commission has failed to accurately predict the market prices of spectrum in the past, it has re-run the auction at a lower price and made the spectrum resources available for use by the public.[17] In the case of the incentive auction, however, Congress has authorized only one voluntary incentive auction for the broadcast spectrum.[18] As a result, an inaccurate prediction of market prices by the government threatens either to make far less spectrum available for broadband than the market – and consumers – would otherwise want, or to force the Commission to pursue additional spectrum using an involuntary incentive auction that is far less favorable to broadcast incumbents than the current approach.[19]

Third, expressing a minimum payment obligation as a fixed or variable MHz-POP price poses special complications in the context of the incentive auction that the Commission does not appear to have considered. An aggregate minimum payment obligation can obviously be expressed as a per unit price and vice versa. The principal concern about the Commission's minimum payment obligation, therefore, is not the Commission's decision to express a minimum

[16] *See* Spectrum Act § 6403(e) (prohibiting the Commission from completing more than one reverse auction under the authority granted).
[17] In Auction 44, for example, the Commission set the reserve price too high, and many licenses did not sell. *See Lower 700 MHz Band Auction Closes Winning Bidders Announced*, Public Notice, 17 FCC Rcd 17272 at Attachments A, C (WTB 2002) (discussing net and gross bids and unsold licenses). The Commission re-auctioned those licenses in Auction 49, lowering the reserve price by 60%. *See Auction of Lower 700 MHz Band Licenses Scheduled for April 16, 2003*, Public Notice, 17 FCC Rcd 24353 (WTB 2002) (discussing the licenses that remained unsold at Auction 44); *Auction of Licenses in the Lower 700 MHz Band Scheduled for May 28, 2003,* Public Notice, 18 FCC Rcd 3138 ¶ 34 (WTB 2003) (discussing reserve prices); FCC, *Auction 49: Lower 700 MHz Band* (last accessed Sept. 15, 2014), http://fcc.us/1AyTHmw (discussing gross and net bids).
[18] *See* Spectrum Act § 6403(e).
[19] *See id.* § 6402.

payment obligation in terms of an average per unit price, but rather the over-arching risks of anti-competitive foreclosure and auction failure associated with setting that price in excess of what Congress and a competitive market would establish. Nonetheless, adopting a per-unit minimum reserve price raises new concerns and complications that go unaddressed by the Commission. In typical auctions, the Commission calculates a reserve price, which could be expressed in the aggregate or per unit, for each block or for each geographic area or both.[20] In this case, however, the per-unit minimum payment would be averaged across *all* blocks and *all* geographic areas.[21] The *Incentive Auction Report and Order* is silent on how this averaging will take place. What rationale or design objective will the Commission use to determine the average? Will the averaging be based on the number of licenses, the geographic area of the license, or on a population-weighted basis? How will the averaging account for the existence of licenses that are impaired to different degrees? And given that the full extent of impairments cannot be known until the final optimization of the repacked broadcast spectrum, how can any such impairment be calculated into the average per unit pricing until after the auction is nearly complete?

The *Incentive Auction Report and Order* is similarly silent on the extent to which this novel, broad-based averaging across all spectrum blocks and all geographic licenses creates opportunities for free riding and other counter-productive bidding behaviors by auction participants. As with any requirement dependent on the collective action of many individual parties, the existence of a single average per unit pricing minimum increases the risk that some

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[20] *See, e.g., Auction of 700 MHz Band Licenses Scheduled for January 24, 2008: Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76*, Public Notice, 22 FCC Rcd 18141 ¶¶ 6-9 (WTB 2007) (discussing block-specific aggregate reserve prices).
[21] *See Incentive Auction Report and Order* ¶ 26.

parties will not act in the hopes that other will.[22] Specifically, the average MHz-POP reserve increases the risk that bidders will withhold demand in the hopes that other auction participants in other geographic areas will express sufficient demand necessary to satisfy the minimum per unit pricing objective set by the Commission. Similar behavioral risks obviously may arise from the per license reserves the Commission has adopted in the past, but the Commission has never before applied a single average reserve to so many different blocks and across so many different types of geographies at once. The *Incentive Auction Report and Order* does not address the possibility of demand withholding, nor does it address the effect that such withholding may have on overall auction revenue and spectrum clearing.

In sum, the Commission has overlooked a number of risks in adopting a double minimum price that includes a price per MHz-POP reserve in the context of the incentive auction. This failure to "articulate a satisfactory explanation for" adopting the per MHz-POP reserve price, "including a 'rational connection between the facts found and the choice made,'"[23] constitutes a material omission, and the Commission must therefore reconsider its decision to adopt a MHz-POP reserve price.[24]

III. CONCLUSION

Two minimum sales prices are not better than one. The Commission should reconsider its decision to adopt a per unit sales price as a premium on top of the aggregate minimum sales price established by Congress for the incentive auction. The proposed minimum price mechanism has the potential to create artificial scarcity in the auction spectrum and increases the risk that the dominant carriers will foreclose their competitors. The Commission also appears to

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[22] *See* Pamela E. Oliver, *Formal Models of Collective Action*, 19 Annu. Rev. Sociol. 271, 273 (1993) ("[I]f the benefits of a collective good cannot be withheld from nonparticipants, rational individuals are motivated to free ride on the contribution of others.").
[23] *See Motor Vehicle Manufacturers Assn.*, 463 U.S. at 43.
[24] *See, e.g.,* 47 C.F.R. §1.429; *see also In the Matter of Connect Am. Fund* ¶ 1.

have overlooked or disregarded the complications that could arise from establishing a double minimum price mechanism, including an average price per MHz-POP reserve, when there will be no further opportunities to re-auction unsold licenses and where auction-specific complexities are entirely unexplored.

Given the significant repercussions for its decision on the first-of-its-kind incentive auction, the rules of administrative procedure require that the Commission provide a more detailed explanation of its rationale. If the Commission seeks to promote auction competition and participation, and avoid any risks that may undermine these goals, then it must reconsider its decision to adopt a two-pronged minimum payment obligation, including a per MHz-POP reserve price.

Respectfully submitted,

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